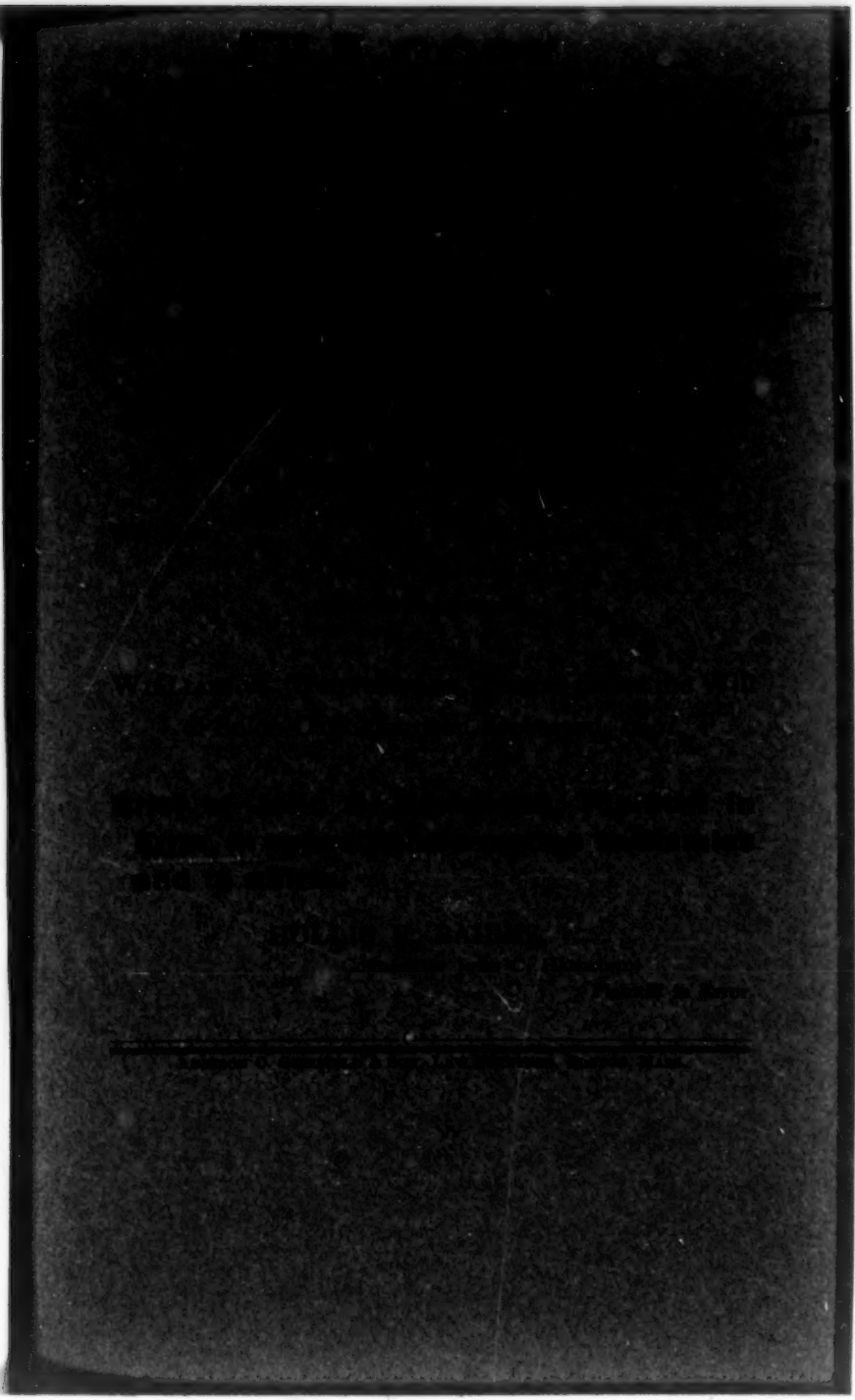

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 164.

JOHN C. HAMMOND,
PLAINTIFF IN ERROR,

v.

WILLIAM W. WHITTREDGE, Trustee under the Will of Solon O. Richardson, Deceased, *et al.*

Brief of John C. Hammond, Plaintiff in Error, in opposition to motion to dismiss and to affirm.

I.

Concise Statement of Case.

The property in dispute consists of a future contingent equitable interest under the will of Solon O. Richardson, who died in 1873.

The plaintiff in error, John C. Hammond, claims the fund under an equitable attachment made in November, 1881, by the Florence Machine Company in a suit against Elbridge L. Sweetser.

The defendants in error, Dowse and Kyle, claim said

fund as assignees in bankruptcy of said Sweetser under a bankruptcy assignment dated March 23, 1878.

The value of this equitable interest of the bankrupt Elbridge L. Sweetser in 1878 depended largely upon his outliving three life beneficiaries. During the three years following the bankruptcy the assignees did nothing to show that they claimed this equitable interest. So far as appeared, they had abandoned the same or were ready to do so.

The equitable attachment of the Florence Machine Company was made to secure payment of promissory notes given by Sweetser after the bankruptcy. The assignees in bankruptcy, Dowse and Kyle, knew of the equitable attachment in 1882, but did not intervene for over sixteen years.

The plaintiff in error, John C. Hammond, claims that in November, 1881, the bankrupt Sweetser had such an amount of title that the Florence Machine Company, by its equitable attachment, was able to assert a claim to his equitable interest adverse to that of his assignees in bankruptcy. He claims further that the assignees, if they wished to contest the validity of this adverse claim, were bound to proceed within two years under the provisions of section 5057 of United States Revised Statutes.

The defendants in error claim that after the bankruptcy assignment the title of the assignees was so complete that no adverse claim could be asserted by means of an attachment. The federal questions involved are well stated in the assignment of errors.

See Assignment of Errors, Record, pp. 59, 60.
See Final Decree, Record, pp. 57, 58.
See Answer of Dowse and Kyle, Assignees in Bankruptcy, Record, pp. 5, 6.

See Amended Answer of John C. Hammond, Record, pp. 14–17.
See Agreed Facts, Record, pp. 35, 39.

II.
First Federal Question.

The defendants in error, Messrs. Dowse and Kyle, claim the fund in question as assignees in bankruptcy of Elbridge L. Sweetser, under an assignment in bankruptcy made in March, 1878.

See Answer of Dowse and Kyle, Record, p. 6.

The final decree (See Record, p. 57) says, —

> "the complete ownership of said equitable interest according to the true construction of the United States Bankrupt Law then in force passed to the Assignees in Bankruptcy of said Elbridge L. Sweetser by the assignment to them dated March 23d A.D. 1878."

The United States bankrupt law in force in 1878 governing assignments in bankruptcy is contained in sections 5044, 5045, and 5046 of United States Revised Statutes.

The plaintiff in error claimed, and now claims, that the true meaning and effect of said federal statutes was different from that found by the Supreme Judicial Court of Massachusetts.

He claims that, according to the weight of authority, a bankrupt, even after an assignment in bankruptcy, has a certain amount of title to the assets of his estate in bankruptcy.

He claims that the assignees may become estopped from

asserting a title as against the bankrupt, or persons claiming under him.

In *Taylor* v. *Irwin*, 20 Fed. Rep. 615, 620, SHIRAS, J., says, —

> "It is for the assignee to determine whether or not in a given case he will assert his right to property. . . . This election he must exercise within a reasonable time. A failure to do so may as against third parties be construed as an election not to claim the property. . . . In January, 1883, when the attention of the assignee was directly called to the property he did not take the steps necessary to assert his right to the property. . . . Under these circumstances the assignee should now be estopped from asserting any right or title to the property against the defendant."

See *Sparhawk* v. *Yerkes*, 142 U.S. 1, 13.
Sessions v. *Romadka*, 145 U.S. 29, 39.
Amory v. *Lawrence*, 3 Clifford, 523, 536.
Smith v. *Gordon*, 6 Law Rep. 317.

It appears by the agreed facts (see Record, pp. 34, 35, 39) that the property in question in 1878, at the time of the bankruptcy, consisted of a future contingent equitable interest, the value of which depended largely upon the bankrupt's outliving three life beneficiaries. During the three years following the bankruptcy, *i.e.*, from March, 1878, to November, 1881, the assignees did nothing to show that they claimed this equitable interest. So far as appeared, they had abandoned the same, or were ready to do so. In November, 1881, the Florence Machine Company, a subsequent creditor of the bankrupt, made an equitable

attachment of this interest by a bill in equity against the bankrupt and the trustee holding the fund. (See Record, p. 35.)

By this attachment the Florence Machine Company asserted a claim to said equitable interest adverse to that of said assignees.

The assignees in bankruptcy knew of this suit in 1882, but did not intervene for over sixteen years. To use the language of Mr. Justice SHIRAS, "They did not take the steps necessary to assert their rights to the property."

To use the language of Chief Justice FULLER in *Sparhawk* v. *Yerkes*, 142 U.S. 1, 14, they "contented themselves with the hope that masterly inactivity might enable them to assert a claim if the asset finally proved of value."

The plaintiff in error claims that, according to the true construction of the above-named sections of the bankrupt law relating to assignments, the bankrupt Sweetser had such an amount of title to this contingent interest that a subsequent creditor could, by an equitable attachment of the same, assert an interest adverse to that of the assignees.

The question is not whether the bankrupt had a complete title, but whether he had such an amount of title that a subsequent creditor could, by an attachment, assert an interest adverse to that of the assignees. If he could by such an attachment assert an adverse interest, it follows that the assignees were bound, at their peril, to take proper steps to maintain their rights.

In *Dushane* v. *Beall*, 161 U.S. 513, a subsequent creditor attached certain assets twelve years after the bankruptcy. It was assumed that the attachment was so far good as to make it incumbent upon the assignees to intervene seasonably and dispute the same.

III.
Second Federal Question.

The plaintiff in error, John C. Hammond, claims title under an equitable attachment made by the Florence Machine Company November 28, 1881. (See Amended Answer of John C. Hammond, Record, p. 14. See also Agreed Facts, Record, p. 35.)

He claims that the bankrupt in 1881, in spite of the bankruptcy, under the existing circumstances had an attachable interest, and that (the attachment being made, and the assignees being informed of it) the assignees were bound to intervene within two years, and assert their title. (See U.S. Rev. Sts. sec. 5057.) He also claims that, apart from section 5057, the assignees were bound to intervene and assert their title within a reasonable time. Not having intervened for over sixteen years they are now barred and estopped from asserting title as against the attaching creditor.

It appears from the opinion of the Supreme Judical Court of Massachusetts (see Record, pp. 61–63) that the Court, without much consideration, in effect held that the title of the assignees was so complete that the bankrupt had no attachable interest, and the assignees were not bound to intervene and assert their title in the attachment suit. This, the said Hammond claims, was error which ought to be corrected.

In *Squire* v. *Lincoln*, 137 Mass. 399, 405, FIELD, J., says, —

> "We are of opinion that if the assignee having notice of the suit does not intervene it is not open to these defendants to set up this defence; it is presumed

then that the assignee assents to the plaintiffs prosecuting the suit."

In the case at bar the assignees knew of the suit, and did not intervene for over sixteen years.

The said Hammond duly raised the point that said intervention was too late. (See Hammond's Amended Answer, Record, p. 17. See Agreed Facts, Record, p. 42.)

IV.

Third Federal Question.

The Massachusetts Court, by their final decree, find that the attachment suit was barred by section 5057. (See Record, p. 58, at top.) This was manifestly error. The assignees had not pleaded this statute as a bar, and the point was not open to them. This finding, moreover, is contrary to the decisions.

See *Rock* v. *Dennett*, 155 Mass. 500.
Avery v. *Cleary*, 132 U.S. 604.

In regard to the true meaning and effect of section 5057 of United States Revised Statutes there is some conflict of authority.

The cases—

Bailey v. *Glover*, 21 Wall. 342, 346, 347;
Rock v. *Dennett*, 155 Mass. 500;
Pritchard v. *Chandler*, 2 Curtis C.C. 488;
Walker v. *Towner*, 16 N.B.R. 285, 287;
Avery v. *Cleary*, 132 U.S. 604,—

hold that the statute (sec. 5057) applies to adverse claims made by third parties after the bankruptcy, and that assignees are bound to dispute such claims within two years of the time when they are asserted.

The case of —

Dushane v. *Beall*, 161 U.S. 513, —

without referring to the above cases, takes a different view.

What was said in *Dushane* v. *Beall* was merely dictum, as the assignees in that case intervened within eight months to dispute the adverse claim.

The plaintiff in error claims that, according to the weight of authority, whenever, after the bankruptcy assignment, adverse claims are properly asserted against the assets, either by attachment or adverse possession or otherwise, the assignees are bound, under section 5057, to proceed in court against the adverse claimant within two years, to maintain their rights.

V.

Abandonment and Laches.

The inferences of the Massachusetts Court that the assignees were not guilty of laches and did not abandon this equitable interest, are not decisive of the question, — Did the bankrupt, in 1881, have such an interest that an equitable attachment could be made, and the assignees placed under a duty of resisting the same?

These inferences, moreover, are open to revision by this Court. The case was heard by the full bench of the Supreme Judicial Court of Massachusetts upon agreed facts, and its inferences are inferences of law, and, so far as federal questions are involved, may be reconsidered by this Court.

Mayhew v. *Durfee*, 138 Mass. 584.

Jaquith v. *Winnisimmet National Bank*, 182 Mass. 57.

VI.
Writ of Error Not Premature.

The defendants in error, Dowse and Kyle, in their brief assert that at the date the writ of error was allowed there was no final decree because there was still a right of appeal. This point is not well taken. The final decree (see Record, p. 57) was entered in accordance with a rescript of the full court. Under this rescript of the full court the case was not remitted for further proceedings, but simply for the entry of the decree directed. (See Record, p. 57.)

Mower v. *Fletcher*, 114 U.S. 127.
Chesapeake &c. Co. v. *Manning*, 186 U.S. 238.

As appears by the reservation (see Record, p. 56), the parties agreed that the full court might direct such a decree as law and justice might require. The decree entered is in accordance with the direction of the full court, and must be considered as final. No decree in Massachusetts ever was or ever can be more final than this.

VII.
Conclusion.

The plaintiff in error claims that important and interesting federal questions are raised by the record in this case. He desires an opportunity to discuss these questions at some length at the proper time, and asks that the motion to dismiss may be overruled, with costs.

Respectfully submitted,
HOLLIS R. BAILEY,
Counsel for JOHN C. HAMMOND,
Plaintiff in Error.